

2) Supreme Court, U.S.
F I L E D

05-964 NOV 16 2005
NO. _____

OFFICE OF THE CLERK
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

JOHN L. HENSS,
Petitioner

v.

IOWA ACCOUNTANCY EXAMINING BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

John L. Henss
Pro Se Petitioner
8980 Hickman Road, Suite 102
Clive, Iowa 50325
515-254-9959

QUESTION PRESENTED FOR REVIEW

The question is whether an administrative board can deprive a person of property in the complete absence of due process of law as guaranteed by Article V, Amendments to the Constitution of the United States.

TABLE OF CONTENTS

SUBJECT INDEX

	<u>Page</u>
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Table of Cases Cited	iv
Citations of Opinions and Orders Entered by Courts or Administrative Agencies	v
Jurisdiction	vi
Constitutional Provisions	2
Statement of Case	4
Reasons for Granting Writ	5
Conclusion	9
Certificate of Service	10
Appendix A Findings of Fact, Conclusions of Law, and Order of The Accountancy Examining Board of the State of Iowa	
Appendix B Ruling Dismissing Petition In The Iowa District Court For Polk County	
Appendix C Order Affirming District Court Ruling In The Court of Appeals of Iowa	
Appendix D Order Denying Further Review In The Supreme Court of Iowa	

TABLE OF AUTHORITIES

STATUTES

	<u>Page</u>
Amendment V., Constitution of the United States	2
Amendment XIV, Constitution of the United States	2
Employee Retirement Income Security Act	
Section 404(a)(2)	3,8
Section 407(d)(3)	8

OTHER

Webster's Dictionary	5
Code of Iowa	
Section 542C.21(2)(1993)	4

TABLE OF CASES CITED

	<u>Page</u>
<i>Anti-Fascist Committee v. McGrath</i> , 341 U.S. 128(1951)	6,10
<i>Collazo v. U.S.</i> , 1952, 196 F.2d 573, 90 U.S., 145, 21 L.Ed. 2d 301, rehearing denied, 89 S.Ct. 848, 393 U.S. 1121, 21 L.Ed. 2d 812	8,10
<i>Coatings, Corp. V. Continental Cas. Co.</i> , Puerto Rico, 1968, 89 S.Ct. 337, 393 U.S. 145, 21 L.Ed. 2d 301, rehearing denied, 89 S.Ct. 848, 393 U.S. 1121, 21 L.Ed. 2d 812	5
<i>Ex parte Wall</i> , 107 U.S. 265(1883)	6,7,9
<i>Martin v. Feilen</i> , 965 U.S. F.2d 660	8
<i>Morgan v. U.S.</i> , 304 U.S. 1 (1938)	6,7,9
<i>U.S. v. Dillman</i> , C.A. Tex. 1945, 146 F.2d 572, cert den. S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989	7,10

**CITATIONS OF OPINIONS AND ORDERS ENTERED BY
COURTS OR ADMINISTRATIVE AGENCIES**

DIA No. 94DOCAB-1 Case No., 89-28

**Before the Accountancy Examining Board
of the State of Iowa**

Appendix A

**Henss v. Iowa Accountancy Examining
Board, Iowa District Court for Polk
County No. AA2984**

Appendix B

**Henss v. Iowa Accountancy Examining
Board, Court of Appeals of Iowa,
No. 5-336/04-1714**

Appendix C

**Henss v. Iowa Accountancy Examining
Board, Supreme Court of Iowa**

Appendix D

STATEMENT OF BASIS FOR JURISDICTION

The judgment of the Supreme Court of Iowa (Appendix D) was filed on August 25, 2005. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is section 1254 of Title 28 of the United States Code.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2005

NO. _____

JOHN L. HENSS
Petitioner,

v.

IOWA ACCOUNTANCY EXAMINING BOARD,
Respondent.

PETITIONER FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF IOWA

To the Honorable Chief Justices and Associate Justice of the
Supreme Court of the United States.

John L. Henss, the Petitioner herein, prays that a writ of certiorari
issue to review the Order Denying Further Review filed in the above
entitled case on August 25, 2005.

CONSTITUTIONAL PROVISIONS

Amendment V to the Constitution of the United States is involved and provides as follows:

“No person shall be held to answer for a capital, or otherwise, infamous crime unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Employee Retirement Income Security Act section 404(a) is involved and provides as follows:

“(a)(1) Subject to sections 403(c) and (d), 4042 and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

“(A) for the exclusive purpose of:

“(i) providing benefits to participants and their beneficiaries; and

“(ii) defraying reasonable expenses of administering the plan;

“(B) with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

“(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

“(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

“(2) In the case of an eligible individual account plan (as defined in section 407(d)(3), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in sections 407(d)(4) and (5)).”

STATEMENT OF THE CASE

The Accountancy Examining Board of the State of Iowa had original jurisdiction of this case. That Board ruled that, "The preponderance of the evidence established that the Respondent violated Iowa Code section 542C.21(2)(1993), dishonesty and/or gross negligence in the practice of public accounting, as defined by 193A IAC 11.3(3) and 11.4(1), when he was enjoined by the United States Court of Appeals for the Eighth Circuit from acting as a service provider to any ERISA plan..." Appendix A-8

The Accountancy Examining Board further wrote, "The Eighth Circuit specifically found: '...ESOP fiduciaries accept a concurrent responsibility to act prudently on behalf of the plan's beneficiaries. For Henss to believe otherwise...demonstrates such a fundamental' misunderstanding of the ERISA statute...as to require that he have no further opportunity to subvert this important federal law.'" Appendix. A-8

The Iowa District Court for Polk County wrote, "In the petitioner's brief and argument he raises only two issues: 1. Whether petitioner's certificate was revoked in accordance with due process following a contested case hearing. 2. The board (Respondent) erred in its findings that the decision of the Eighth Circuit provides substantial evidence to support the action taken by the Board." Appendix B-1

The Court of Appeals of Iowa wrote "...no due process... issues were raised before the agency during either the contested case hearing or through on application for rehearing, and therefore those issues were not preserved for judicial review." Appendix C-5

The Supreme Court of Iowa wrote, "After consideration by this court en banc, further review of the above captioned case is denied." Appendix D-1

REASONS FOR GRANTING WRIT

This case originated when the Iowa Accountancy Examining Board, through its administrator, filed a vague and non-specific statement of charges. The Board's counsel offered to settle the matter if Henss would agree to a one month suspension of his license to practice public accounting in Iowa and pay a fine of \$1,000. The statement of charges included an accusation of dishonesty which the Board refused to withdraw. Henss desired to answer and refute that charge so the matter went to hearing.

At the hearing Henss asked the complainant, "Dishonesty has also been charged, but there are no specifications. Would you give the Court the specifications of that charge, please?" The witness made no response but counsel for the Board stated, "Well, the State will stipulate there's no definition of the term dishonesty in the administrative rules. The term speaks for itself." The administrative law judge states, "The state stipulates there's no definition of dishonesty. The Board, in their discretion, apply what that means in the context of their statutes and rules?" Counsel: "Yes". Despite the Board's thinking that there is "no definition of dishonesty" Webster demonstrates otherwise. In the New International Dictionary that term is defined as "want of honesty, probity, or integrity in principle; want of fairness and straightforwardness; a disposition to defraud, deceive, or betray; faithlessness." When one is accused of all of those faults surely due process requires that he be furnished with the specifications of those charges and given the opportunity to refute them. Dishonesty is an absolute, i.e., either one is honest or he is dishonest, there is no middle ground. No one is kind of honest or somewhat honest. The Board further stated, "...the Board is convinced that the Respondent has repeatedly lied to them..." Still there are no specifications of such charge. In *Coatings Corp. v. Continental Cas. Co.*, Puerto Rico, 1968, 89 S.Ct. 337, 393 U.S. 145, 21 L.Ed 2d 301, rehearing denied, 89 S.Ct. 848, 393 U.S. 1112, 21 L.Ed. 2d 812 this Court ruled that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even appearance of bias. When the Board refuses to provide any specifications of its charge of dishonesty and when it says Henss has "repeatedly lied" to them, again with no specifications this is not only bias, it is libel of the highest degree.

That issue has been addressed and ruled upon by this Court. In *Morgan v. U.S.*, 304 U.S. 1 (1938), "...in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play... The right to a hearing embraces... a reasonable opportunity to know the claims of the opposing party and to meet them... Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and be heard upon its proposals before it issues its final command... those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature... The maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance... as we said at the outset, if those multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers they must accredit themselves by acting in accordance with the cherished judicial traditions embodying the basic concept of fair play."

"...[One's] calling or profession is his property, within the true sense and meaning of the Constitution...secret whisperings of men who dare not or will not speak openly and verify their statements, do not constitute such 'knowledge of the court' as to make it the basis of judicial proceedings affecting any one's rights...the accuser should not be the judge of the accusation." *Ex parte wall*, 107 U.S. 265 (1883) In the instant case the Board saw fit to engage in "secret whisperings of men" who refused to "verify their statements" and thereby those statements are the "basis of judicial proceedings affecting" Henss's rights. Furthermore, although "the accuser should not be the judge of the accusation", in the instant case the accuser was also the jury and the prosecutor was counsel for the accuser and the jury.

In *Anti-Fascist Committee v. McGrath*, 341 U.S. 128(1951) this court again addressed this subject. "Fairness of procedure is 'due process in the primary sense'... This Court has never held, nor must we now be understood, as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at

the time of the adoption of the Constitution...fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights... Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of righteousness... Due process is perhaps the most majestic concept in our whole Constitutional system... A party is entitled to know the charge against him; he is also entitled to notice and opportunity to be heard."

Amendment V, Constitution of the United States guarantees that "No person shall be...deprived of...property without due process of law..." This Court ruled, in *Ex parte Wall*, a person's "profession is his property". This Court has, in *Morgan v. U.S.*, ruled that in a "quasi-judicial" proceeding "property...shall be protected by... fair play... to know the claims of the opposing party..." In the instant case the Board charged Henss with dishonesty, took the position that "there's no definition of dishonesty" and shall "apply what that [dishonest] means in the context of their...rules." Thus the Board believes that it may define terms as it sees fit and that because of its own self-serving definition is not required to inform Henss of and permit him to refute any of the charges against him. Only the members of the Board and its counsel could possibly believe that they are above the United States Supreme Court in wisdom and dispensation of justice.

The Board's Findings of Fact state, "The findings of the Eighth Circuit and their decision to permanently enjoin him from acting as a service provider support the conclusion that the Respondent was either dishonest or, if he believed he was acting properly, grossly negligent in his public accounting practice... The Eighth Circuit specifically found: "...ESOP fiduciaries accept a concurrent responsibility to act prudently on behalf of the plan's beneficiaries. For Henss to believe otherwise...demonstrates such a fundamental misunderstanding of the ERISA statute...as to require that he have no further opportunity to subvert this important federal law."

In *U.S. v. Dillman*, C.A. Tex. 1945, 146 F.2d 572, cert. den. S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989 it was held that the basic elements of a full and fair hearing include the right of each party to be apprised of all the evidence upon which a factual adjudication rests plus the right to examine,

explain or rebut all such evidence" The decision of the United States Court of Appeals in *Martin v. Feilen*, 965 F.2d 660 was the only evidence introduced by the Board of which Henss had knowledge at the time and he was not permitted to explain or rebut it. Had he been given that due process right he could have explained his position. Henss did not testify that fiduciaries do not have the "responsibility to act prudently on behalf of the plan's beneficiaries." He testified that an ESOP is exempt from the "prudent man rule" as regards any requirement for diversification of investments which that rule might dictate. That testimony was based upon section 404(a)(2) of ERISA, "In the case of an eligible individual account plan (as defined in 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer...securities..." Henss was not granted his due process right to examine and explain the Board's only disclosed piece of evidence. It was held, in *Collazo v. U.S.*, 1952, 196 F.2d 573, 90 U.S. App. D.C. 241, cert. den. 72 S.Ct. 1065, 343 U.S. 968, 96 L.Ed. 1364, that the right of cross-examination is a fundamental right and may not be improperly restricted "Cross-examination" is defined as "the examination of a witness upon a trial or hearing, or upon taking a deposition, by the party opposed to the one who produced him, upon his evidence given in chief, to test its truth, to further develop it, or for other purposes although a fundamental right, Henss was denied that right to test the truth of or to further develop the Board's only piece of evidence.

The Court of Appeals of Iowa wrote, "Henss, however, attempts to side-step entrenched principles of *res judicata* by advancing a theory that he suffered prejudice when he was given no opportunity to rebut 'considerable' evidence supplied by a newly discovered 'secret witness'... The 'secret witness' to which Henss refers was James Craig of the United States Department of Labor... The 'newly discovered evidence' consists of a cover letter from the assistant attorney general handling the revocation proceedings to Craig thanking him for his assistance, the nature of which is not detailed in the letter or elsewhere in the record." App. C-5 That is the point, Craig's assistance is not known. It may be entirely insignificant or may be extremely important but Henss has the right to know. The only knowledge that Henss now has is that counsel for the Board thanked Craig "for all the assistance you provided in ensuring that this matter was fully and properly addressed by the Board."

knowledge that Henss now has is that counsel for the Board thanked Craig "for all the assistance you provided in ensuring that this matter was fully and properly addressed by the Board."

The Court of Appeals of Iowa further wrote, "The district court noted in its 1995 decision on judicial review that no equal protection or due process arguments were presented before the agency or in any application for rehearing... Accordingly, the district court concluded these issues, to the extent raised were not preserved for judicial review." It is submitted that when rights granted by the Constitution are arbitrarily withheld from Appellant by being ignored by the administrative board then it must follow that those issue are preserved. The record shows that the rights were denied and the judicial review is *de novo* on the record. Therefore, the record itself presents and preserves these constitutional issues.

Because "fairness can rarely be obtained by secret one-sided determination of facts decisive of rights" and because "secret whisperings of men who dare not or will not speak openly...do not...make it the basis of judicial proceedings affecting any one's rights" it is obvious that Henss was denied due process of law. Despite the absence of due process he was deprived of property even though the constitutions of the United States and of the state of Iowa guaranty that no citizen shall be deprived of property without due process. Yet Henss has been deprived of property and great financial loss through denial of due process of law by Respondent. It must follow, then, that the Board's revocation of Henss's certified public accounting certificate is void and is not existent and there can be no limitation accruing on an action that does not exist and the 1994 hearing and all decisions and orders related thereto are non-existent.

CONCLUSION

In summary the Board charged Henss with dishonesty without any specifications of that charge and the Board refused Henss the right to discuss and explain its only piece of evidence and refused fair play despite this Court's holding otherwise in *Morgan v. U.S.* The Board called Henss a liar but could not provide specifications. This is what was called "secret whisperings" in *ex parte Wall*. According to this Court's ruling in *ex parte Wall* Henss's professional license was his property yet he was deprived of that property by administrative officers without a fair hearing upon the

fundamental facts despite this Court's holding in *Anti-Fascist Committee v. McGrath*. Henss was denied the right to be apprised of all the evidence and was denied the right to examine, explain and rebut the Board's evidence despite the holding in *U.S. v. Dillman*. Henss was denied his fundamental right to cross-examination despite this Court's holdings in *Collazo v. U.S.*

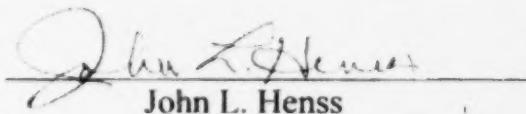
Because of decisions of this Court on questions of law in the cases cited and quoted herein the issues raised by Henss have been decided in his favor and the doctrine of *stare decisis* is binding.

Respectfully submitted,


John L. Henss
Pro Se Petitioner
8980 Hickman Road, Suite 102
Clive, Iowa 50325

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Iowa was served on Pamela D. Griebel, Attorney for Respondent, by depositing three copies of said Petition in the United States mail, postage prepaid on January 19, 2006 addressed to her at Hoover Building, 2nd Floor, Des Moines, Iowa 50319.


John L. Henss

APPENDIX

**Findings of Fact, Conclusions of Law,
and Order of The Accountancy Examining
Board of the State of Iowa**

**Ruling Dismissing Petition, Iowa District
Court for Polk County**

**Order of The Court of Appeals of Iowa
Affirming Ruling Dismissing Petition**

**Order of The Supreme Court of Iowa Denying
Further Review**

BEFORE THE ACCOUNTANCY EXAMINING BOARD
OF THE STATE OF IOWA

IN THE MATTER OF:)	DIA NO. 94DOCAB-1
)	CASE NO. 89-28
JOHN L. HENSS)	
)	
Certificate No. 499)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent)	AND ORDER

On December 4, 1993, a Complaint was filed by William M Schroeder, Executive Secretary of the Iowa Accountancy Examining Board (hereinafter the Board), following a finding of probable cause by the Board. The Complaint, as amended at the hearing, alleged two counts: 1) that the Respondent was charged with conduct discreditable to the public accounting profession, in violation of Iowa Code section 542C.21(10) (1993), and as defined by 193A IAC 11.6(1), when he was permanently enjoined from acting as a service provider to any employee benefit plan subject to ERISA; and 2) that the Respondent was charged with dishonesty and/or gross negligence in the practice of public accounting pursuant to Iowa Code section 542C.21(2)(1993), as defined by 193A IAC 11.3(3) and 11.4(1), for having been enjoined by the United States Court of Appeals for the Eighth Circuit from acting as a service provider to any ERISA plan and further permanently enjoined from serving directly or indirectly as a fiduciary to any employee benefit plan subject to ERISA.

An Order and Notice of Hearing was issued on March 22, 1994, setting the hearing for May 16, 1994.

The hearing on the above Complaint was held on May 16, 1994, at 1:10 p.m. in the conference room, 1918 S.E. Hulsizer Avenue, Ankeny, Iowa. The following members of the Board were present: John C. Cain, C.P.A., Chairperson; Thomas L. Erpelding, C.P.A.; Jean E. Kruse, C.P.A.; Paul S. Stave, C.P.A.; David A. Vaudt, C.P.A.; Dorothy Dunphy, Public Member. Theresa O'Connell Weeg, Assistant Attorney General, appeared for the State. The Respondent; John L. Henss, appeared pro se. The hearing was

closed to the public at the Respondent's request, pursuant to Iowa Code section 272C.6(1)(1993). Present also were members of the Board staff and a court reporter. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, presided.

The record was held open for five working days to allow the Respondent to file a brief in resistance to the admission of Exhibit D and an additional five days to allow the state to respond. Exhibit D was admitted into the record.

After hearing the testimony and examining the exhibits, the Board convened in closed session, pursuant to Iowa Code section 21.5(1)(f)(1993), to deliberate its decision. The Board directed the Administrative Law Judge to prepare this decision and order.

THE RECORD

The record includes the Complaint, the Order and Notice of Hearing, Request for a Closed Hearing, the testimony of the witnesses, and the following exhibits:

State's Exhibit A: *Martin v. Feilen*, et al., Nos. 91-1086, 91-1295, United States Court of Appeals for the Eighth Circuit.

State's Exhibit B: *Martin v. Feilen*, Consent Order, filed November 23, 1992.

State's Exhibit C: Stipulation, August 2, 1982.

State's Exhibit D: Final Decision, Case No. 91-16, dated December 22, 1992.

Respondent's Exhibit 1: *Martin v. Feilen*, et al., Nos. 91-1086, 91-1295, United States Court of Appeals for the Eighth Circuit.

Respondent's Exhibit 2-8: not admitted

Respondent's Exhibit 9: Iowa Code section 542C.21

Respondent's Exhibit 10: 193A IAC 11.6(1)

Respondent's Exhibit 11: 193A IAC 12.4(1) (b)

Respondent's Exhibit 12: 193A IAC 11.3, 11.4

FINDINGS OF FACT

1. On February 2, 1960, the Respondent was issued Iowa CPA Certificate No. 499 by the Board. Iowa Certificate No. 499 is currently in good standing. (Board file)
2. On August 1, 1982, the Respondent and the Board entered into a Stipulation as a result of allegations that the Respondent failed to comply with applicable generally accepted auditing standards and generally accepted accounting principles in the performance of certain financial statements for the years 1979 and 1980. Pursuant to the terms of the stipulation, the Respondent agreed to a one-year period of supervision, subject to certain conditions, including a continuing education requirement. (testimony of Bill Schroeder; State's Exhibit (C)
3. On June 3, 1992, the United States Court of Appeals for the Eighth Circuit filed a decision in Case Nos. 91-1086 and 91-1295. Both involved the Secretary of Labor, United States Department of Labor, as the plaintiff. The Respondent, his professional corporation, and his public accounting firm, Oden, Henss and Thielking (OHT) were all named defendants, along with others. (Exhibit A).
 - a. The cases involved alleged breaches of fiduciary duties under ERISA. (Employee Retirement Income Security Act, 29 U.S.C. Sec. 1000-1461) (Exhibit A, p. 2)
 - b. In May 1974 the Respondent, an outside accountant for Feilen Meat Company (FMC), proposed and structured an Employee Stock Ownership Plan (ESOP) for the company. (Exhibit A, p. 3)
 - c. In fall 1977, the Respondent proposed and structured a leveraged buy-out of FMC. (Exhibit A, p. 3)

- d. Beginning with the leveraged buy-out in 1977, and ending with FMC's demise in February 1985, corporate insiders engaged in a series of transactions involving FMC, its stockholders, related entities, and in some cases the ESOP. (Exhibit A, p. 4)
- e. The transactions were done at the recommendation of the Respondent and one of his partners at OHT, who had personal financial interests in many of the transactions in addition to their role as FMC's outside accountants. (Exhibit A, p. 4)
- f. The Eighth Circuit Court of Appeals stated that ERISA imposes high standards of fiduciary duty upon those responsible for administrating an ERISA plan and investing and disposing of its assets. The ERISA fiduciary is subject to a strict standard of care, 29 USC Sec. 1104(a)(i); is liable for known breaches of co-fiduciaries, Sec. 1105; and may not engage in prohibited transactions, Sec. 1106. (Exhibit A, pp. 5-6)
- g. The Eighth Circuit concluded that ERISA's fiduciary duties under Sec. 1104 attach to transactions that involve investing the ESOP's assets or administering the plan. (Exhibit A, p. 10) In addition, the Eighth Circuit identified several transactions subject to ERISA which involved the Respondent or his corporation. (Exhibit A, pp. 10-12)
- h. The Eighth Circuit found that the Respondent and his partner "provided the ESOP with far more than accounting services. They recommended transactions, structured deals, and provided investment advice to such an extent that they exercised effective control over the ESOP's assets, since none of the other corporate insiders had the expertise in accounting and employee benefits law need to spin the tangled web of transactions at issue." (Exhibit A, pp. 16-17)
- i. The Eighth Circuit further found that the Respondent and his partner were corporate insiders who "used their positions of trust and confidence to involve the ESOP in transactions in which they had personal interest" and concluded that the Respondent and his partner must be held responsible for any breaches of fiduciary duty that occurred in connection with the transactions subject to ERISA. (Exhibit A, p. 17)

- j. The Eighth Circuit found that an ESOP fiduciary is not prohibited from being on both sides of a transaction involving the ESOP's assets, but he must serve both masters (or at least the ESOP) with the utmost care and fairness. (Exhibit A, p. 19)
- k. The Eighth Circuit concluded that the responsible fiduciaries violated ERISA fiduciary duties by their "reprehensible self-dealing, not the kind of divided but honest loyalty Congress intended." (Exhibit A, p. 20)
- l. The Eighth Circuit specifically found that the Respondent was the dominant decision-maker for FMC and the ESOP with respect to all or nearly all the transactions, that he holds himself out as an ERISA expert who has structured and provided other services and advice to hundreds of ESOPs, and that he displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries. (Exhibit A, p. 24)
- m. The Eighth Circuit permanently enjoined the Respondent from serving directly or indirectly as a fiduciary for any ESOP or ESOT or any other employee benefit plan covered by ERISA, and from engaging in any acts that violate fiduciary duties imposed by ERISA. (Exhibit A, pp. 22-23)
- n. The Eighth Circuit also permanently enjoined the Respondent from acting as a service provider to any ERISA plan. In reaching this decision, the court stated "...ESOP fiduciaries accept a concurrent responsibility to act prudently on behalf of the plan's beneficiaries. For Henss to believe otherwise, and to engage in the transactions here at issue, demonstrates such a fundamental misunderstanding of the ERISA statute, regulations, and case law as to require that he have no further opportunity to subvert this important federal law." (Exhibit A, p. 24)

4. The Eighth Circuit also remanded the case to the United States District Court for further consideration of other issues. On remand, the parties entered into a Consent Order. The Respondent agreed not to serve as a fiduciary or service provider to any benefit plan subject to ERISA, with the exception of his own ESOT, so long as the Respondent and his wife are the only participants and beneficiaries. (testimony of Bill Schroeder; Exhibit B)

CONCLUSIONS OF LAW

1. Iowa Code section 542C.21(2) and (10)(1993) provide in relevant part:

Causes for revocation, suspension, or refusal to renew.

After notice and hearing as provided in section 542C.23, the board may revoke or may suspend for a period not to exceed two years, a certificate issued under section 542C.5 or a license issued under section 542C.7 or 542C.8, or may revoke, suspend, or refuse to renew a permit issued under section 542C.20, or may censure the holder of a permit, for any one or any combination of the following causes:

* * *

2. Dishonesty, fraud, or gross negligence in the practice of public accounting.

* * *

10. Conduct discreditable to the public accounting profession.

(Iowa Code section 542C.21 is found at 116.21 in the 1991 Code)

2. 193A IAC 11.6(1) provides:

11.6(1) Acts discreditable. A CPA or AP shall not commit any act that reflects adversely on their fitness to engage in the practice of public accountancy.

3. 193A IAC 11.3(3) and 11.4(1) provide in relevant part:

11.3(3) Integrity and objectivity. A CPA or AP shall not, in the performance of professional services, knowingly misrepresent facts or subordinate judgment to others . . .

11.4(1) Competence. A CPA or AP shall not undertake any engagement for the performance of professional services which the accountant or accountant's firm cannot reasonably expect to complete with due professional competence, . . .

4. 193A IAC 12.4(1)(b) provides in relevant part:

12.4 Grounds for disciplinary action. The board may initiate disciplinary action against a CPA, AP, or a firm of CPAs or APs, on any of the following grounds:

12.4(1) For any of the grounds set forth in Iowa Code section 542C.21.

* * *

b. When considering alleged violations of Iowa Code section 542C.21(11)¹, the phrase "conduct discreditable to the public accounting profession" shall be construed in light of the following:

The reliance of the public in general and of the business community in particular on sound financial reporting, and on the implication of professional competence which inheres in the authorized use of a legally restricted title relating to the practice of public accountancy, imposes on a CPA or AP engaged in such practice certain obligations both to their clients and the public. These obligations include the obligation to maintain independence of thought and action, ... to uphold the standards of the public accountancy profession, and to maintain high standards of personal conduct in all matters affecting one's fitness to practice public accountancy...

5. The preponderance of the evidence established that the Respondent violated Iowa Code section 542C.10(1993), conduct discreditable to the public accounting profession, as defined by 193A IAC 11.6(1), when he was permanently enjoined by the United States Court of Appeals for the Eighth Circuit from serving directly or indirectly as a fiduciary to any employee benefit plan subject to ERISA and permanently enjoined from acting as a service provider to any ERISA plan.

Public trust and confidence is essential to the practice of public accountancy. The findings of the Eighth Circuit eviscerates the public's trust in the Respondent. The Eighth Circuit specifically found that the Respondent used his position of trust and confidence to involve the ESOP in transactions in which he had personal interest. The Respondent failed to maintain independence of thought and action and failed to uphold the

¹This is an apparent typo in the rule. It should read 542C.21(10). There is no subsection 11.

standards of the public accountancy profession. The Respondent's actions which led to the issuance of the decision by the Eighth Circuit were conduct discreditable to the public accounting profession.

6. The preponderance of the evidence established that the Respondent violated Iowa Code section 542C.21(2) (1993), dishonesty and/or gross negligence in the practice of public accounting, as defined by 193A IAC 11.3(3) and 11.4(1), when he was enjoined by the United States Court of Appeals for the Eighth Circuit from acting as a service provider to any ERISA plan or from serving directly or indirectly as a fiduciary to any employee benefit plan subject to ERISA.

The findings of the Eighth Circuit and their decision to permanently enjoin him from acting as a service provider support the conclusion that the Respondent was either dishonest or, if he believed he was acting properly, grossly negligent in his public accounting practice. The Respondent held himself out to the public as a CPA who was an ERISA expert. The Eighth Circuit specifically found: "... ESOP fiduciaries accept a concurrent responsibility to act prudently on behalf of the plan's beneficiaries. For Henss to believe otherwise, and to engage in the transactions here at issue, demonstrates such a fundamental misunderstanding of the ERISA statute, regulations; and case law as to require that he have no further opportunity to subvert this important federal law." The court's findings established that the Respondent's actions fell far below the standard of care required of him.

ORDER

The Respondent has committed an egregious violation of the public trust. He has been previously disciplined by this Board. Given the seriousness of these violations and the prior disciplinary action; it is appropriate to revoke the Respondent's certificate.

IT IS HEREBY THE ORDER of the Accountancy Examining Board of the State of Iowa that the certificate of certified public accountant, No. 499, issued to John L. Henss, is hereby REVOKED.

IT IS FURTHER ORDERED that the Respondent shall pay a civil penalty of \$1,000.00 within thirty days of receipt of this decision and order.

IT IS FURTHER ORDERED that the Respondent may not apply for reinstatement until two years after the effective date of the revocation. Reinstate ment would only be granted if the Respondent satisfies the requirements of 193A IAC 12.16.

Dated this 10th day of June, 1994.

John C. Cain, C.P.A.
Chairperson
Iowa Board of Accountancy Examiners

ML/jmm

cc: Theresa O'Connell Weeg

In accordance with Iowa Code section 542C.23(10) (1993), judicial review of the board's action may be sought in accordance with Chapter 17A of the Iowa Code.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOHN L. HENSS :

Petitioner, : NO AA 2984

vs. :

IOWA ACCOUNTANCY : RULING DISMISSING
EXAMINING PETITION

BOARD, :

Respondent :

This matter was heard by the undersigned judge on 24 September, 2004, pursuant to the scheduling Order of July 7, 2004. The petitioner filed a petition for judicial review of a decision of the Iowa Accountancy Examining Board. On December 23, 1997, Judge Arthur E. Gamble entered a ruling on respondent's motion to dismiss. He Ordered: "To the extent Petitioner's Petition for Judicial Review seeks review of the June 10, 1994, decision of the Board, Respondent's Motion to Dismiss is sustained." In the petitioner's brief and argument he raises only two issues:

1. Whether petitioner's certificate was revoked in accordance with due process following a contested case hearing.
2. The board (respondent) erred in its findings that the decision of the Eighth Circuit provides substantial evidence to support the action taken by the Board.

These issues go solely to ruling of the respondent board of June 10, 1994. Judge Gamble's ruling of December 23, 1997, in effect dismiss the whole of petitioner's petition as the sole basis of his petition seeks to again attack in 1997 the 1995 court order upholding the Board's revocation of his CPA certificate. The respondent claims he can sidestep the limitation period by reference to a 1994 letter written by Board counsel which he received in

1997 through a freedom of information request. He did not present this letter to the Board in his contested case proceeding. He first provided a copy as an attachment to the Response to Motion for More Specific Statement he filed in the district court on November 4, 1997. This letter is a cover letter from one attorney to another enclosing a copy of the revocation order. Judge Gamble held in his ruling of December 23, 1997, the "Petition's discovery of allegedly newly discovered evidence does not vest the Court with jurisdiction to hear an appeal from this 1994 decision. IT IS ORDERED BY THE COURT, the petitioner's Brief Points I and II do not raise any timely challenge to the Board's 1997 decision, therefore his petition for judicial review is dismissed. Court costs are taxed to the petitioner.

SENIOR DISTRICT COURT JUDGE

Mail copies to:

John L. Henss

Pamela D. Griebel

IN THE COURT OF APPEALS OF IOWA

No. 5-336/04-1714

Filed June 29, 2005

JOHN L. HENSS,

Petitioner-Appellant,

vs.

IOWA ACCOUNTANCY EXAMINING BOARD,

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Leo Oxberger, Judge.

John Henss appeals from the denial of his petition for judicial review.
AFFIRMED.

John L. Henss, Des Moines, appellant pro se.

Thomas J. Miller, Attorney General, and Pamela D. Griebel, Assistant Attorney General, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

Appendix C-1

HECHT, J.

John Henss appeals from the denial of his petition for judicial review. We now affirm.

1. Background Facts and Proceedings.

In 1992, Henss, then licensed as a Certified Public Accountant (CPA), and his public accounting firm were named defendants in a lawsuit brought by the United States Department of Labor. That litigation culminated in a decision of the Eighth Circuit Court of Appeals. See *Martin v. Feilen*, 965 F.2d 660, 663 (8th Cir. 1992). That court's decision established that Henss structured an Employee Stock Ownership Plan (ESOP) for a Des Moines-based company in 1977. Henss then recommended and the company undertook a series of transactions between 1977 and 1985 resulting in the complete loss of the company's ESOP retirement plans and the eventual self-dealing and constituted a breach of Henss's fiduciary duties owed under the Employee Retirement Income Security Act (ERISA). *Id.* at 664. The federal court permanently enjoined Henss from serving directly or indirectly as (1) a fiduciary for an ESOP, (2) a service provider to any ERISA plan, and (3) a fiduciary or service provider for any other plan subject to ERISA. *Id.* at 671-673.

A complaint against Henss was filed with the Iowa Accountancy Examining Board (agency) in 1993. The complaint alleged Henss had engaged in (1) conduct discreditable to the public accounting profession, and (2) otherwise dishonest and/or grossly negligent conduct in the practice of public accounting. A properly noticed hearing was held on May 16, 1994. The federal court ruling in *Feilen* was considered by the agency as evidence supporting the complaint against Henss.

The agency found Henss had committed "an egregious violation of the public trust." The agency (1) revoked Henss's CPA certificate, (2) ordered him to pay a civil penalty of \$1,000, (3) required him to notify his clients of the revocation and supply such notice to the agency within thirty days, and (4) enjoined him from holding himself out as a CPA in any manner. Henss sought judicial review of the 1994 revocation. In 1995, the agency action was affirmed by the district court based on its conclusion that the agency's findings were supported by substantial evidence. [1]

In 1996, Henss applied to the agency for reinstatement of his CPA certificate. A properly noticed hearing on the issue of reinstatement was held before the agency on May 20, 1997. Noting the wholesale disregard of its conditions on revocation – including the failure to pay the civil penalty and to notify clients of the revocation – the agency refused to reinstate Henss's certificate. Henss again sought judicial review before the district court. However, the district court was unable to discern whether the assignments of error contained in Henss's petition challenged the agency's 1997 decision declining to reinstate the certificate or the agency's 1994 decision to revoke the certificate. The district court dismissed the 1997 petition for judicial review as untimely to the extent it sought review of the 1994 agency decision, and ordered a more specific statement of any challenge to the 1997 agency decision. Henss filed his response to the district court's order for a more specific statement; however, no further action on the petition for judicial review was taken by Henss, and the case languished in the district court for six years. Because the clerk of court failed to provide Henss with the appropriate dismissal notice for want of prosecution, and because Henss had complied with the district court order directing him to provide a more specific statement, the district court eventually set the 1997 judicial review petition for hearing.

The judicial review hearing was held on September 24, 2004. The district court noted both issues raised in the 1997 judicial review petition involved attacks directed at the 1994 agency decision to revoke Henss's certificate rather than challenges to the 1997 agency refusal to reinstate the certificate. The district court therefore dismissed the petition, finding it failed to raise any timely challenge to the 1997 decision not to reinstate the certificate.^[2] Henss now appeals.

II. Scope and Standard of Review.

Review of an agency determination is for errors at law. *Cobb v. Employment Appeal Bd.*, 506 N.W. 2d 445, 447 (Iowa 1993). We review district court decisions on judicial review of agency action under the standards of Iowa Code chapter 17A(1997). Locate. *Plus. Com. Inc. v. Iowa Dep't of Transp.*, 650 N.W. 2d 609, 612 (Iowa 2002). As the district court is itself acting in an appellate capacity to correct errors of law on the part of the agency, on appeal “we apply the standards of Iowa Code section 17A.19(8) to the agency action to determine whether our conclusions are

the same as those of the district court.” *Swanson v. Employment Appeal Bd.*, 554 N.W. 2d 294, 296 (Iowa Ct. App. 1996).

An agency’s findings of fact are binding on the court where such determinations “are clearly vested by a provision of law in the discretion of the agency.” *Mycogen Seeds v. Sands*, 686 N.W. 2d 457, 465 (Iowa 2004). The agency here is given specific authority to revoke a CPA’s certificate if it finds the person has committed, among others, (1) acts constituting dishonesty or gross negligence in the practice of public accounting, or (2) conduct discreditable to the accounting profession. Iowa Code Sec. 542C.21 (1993). The agency is likewise granted authority to determine whether it would be in the public interest to reinstate the revoked certificate of a person. *Id.* Sec. 542C.24[3] On review we are therefore bound by the factual determinations made by the agency if supported by substantial evidence. *Mycogen Seeds*, 686 N.W. 2d at 465. Evidence is substantial if a reasonable mind would accept it as adequate to reach a finding. *Swanson*, 554 N.W. 2d at 296.

III. Discussion.

Henss’s 1997 judicial review petition filed with the district court following the agency’s denial of his first application for reinstatement raises two issues: (1) Whether Henss’s certificate was revoked in accordance with due process following a contested case hearing, and (2) whether the agency erred in finding the federal court’s decision in *Feilen* provides a substantial evidence supporting the revocation. As was aptly noted by the district court, both issues raised by Henss on judicial review are direct challenges to the agency’s 1994 revocation ruling. As we have indicated, Henss sought judicial review of the 1994 revocation, claiming the agency’s 1994 decision was unsupported by substantial evidence and the federal court’s decision could not supply substantial evidence. Because these claims were resolved by the agency against Henss and affirmed by the district court on judicial review, Henss is precluded from re-litigating those issues through his 1997 judicial review petition. *Fischer v. City of Sioux City*, 654 N.W. 2d 544, 547 (Iowa 2002); *Iowa Coal Mining Co. v. Monroe County*, 555 N.W. 2d 418, 441 (Iowa 1996).

Henss, however, attempts to side-step entrenched principles of res judicata by advancing a theory that he suffered prejudice when he was given no opportunity to rebut “considerable” evidence supplied by a newly

discovered “secret witness.”^[4] Henss contends he was denied due process as a consequence of the agency’s consideration of the evidence supplied by that witness, and thus the revocation of his certificate is void. The record indicates that in 1995 the district court, in reviewing the agency’s 1994 revocation ruling, found no due process or equal protection issues were raised before the agency during either the contested case hearing or through an application for rehearing, and therefore those issues were not preserved for judicial review. Additionally, Henss has failed to explain how he was prejudiced by the involvement of the “secret witness.” Finding no reason for departing from the district court’s conclusion that no meritorious challenge to the 1997 agency ruling on reinstatement was advanced by Henss’s 1997 petition for judicial review, we affirm the agency’s denial of Henss’s 1997 application for the reinstatement of his CPA certificate.

AFFIRMED.

- [1] The district court noted in its 1995 decision on judicial review that no equal protection or due process arguments were presented before the agency or in an application for rehearing. It also noted Henss had failed to assert any claim of discriminatory prosecution before the agency. Accordingly, the district court concluded these issues, to the extent raised, were not preserved for judicial review.
- [2] Iowa Code section 17A.3 (1997) requires all petitions for judicial review of an agency’s final decision in a contested case to be filed within thirty days of the issuance of the agency’s final decision.
- [3] In 2001, chapter 542C was repealed by the legislature, and reinstated as chapter 542. The relevant sections vesting authority in the agency to both revoke and reinstate a certificate are not contained in Iowa Code sections 542.10 and 542.12 (2005) respectively.
- [4] The “secret witness” to which Henss refers was James Craig of the United States Department of Labor, who had apparently provided the agency with some sort of assistance “in ensuring that the [Henss] matter was fully and properly, addressed by the [agency].” The “newly discovered evidence” consists of a cover letter from the assistant general handling the revocation proceedings to Craig thanking him for his assistance, the nature of which is not detailed in the letter or elsewhere in the record.

IN THE SUPREME COURT OF IOWA

No. 04-1714

Polk County No. AA2984

ORDER

**JOHN L. HENSS,
Petitioner-Appellant,**

vs.

**IOWA ACCOUNTANCY EXAMINING BOARD,
Respondent-Appellee.**

After consideration by this court en banc, further review of the above captioned case is denied.

Dated this 25th day of August, 2005.

THE SUPREME COURT OF IOWA

By S/Louis A. Lavorato
Louis A. Lavorato, Chief Justice

Copies to:

John L. Henss
8980 Hickman Road, Suite 102
Clive, Iowa 50325

Attorney General
Attn: Pamela Griebel
Hoover Bldg.
L O C A L